

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD  
2009 MSPB 60**

---

Docket No. DC-0752-06-0196-I-1

---

**Emma Agbenyeke,  
Appellant,  
v.  
Department of Justice,  
Agency.**

April 21, 2009

---

Zachary Murry, Esquire, Bethesda, Maryland, for the appellant.

Stephen H. Fallowfield, Esquire, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review (PFR) of the February 6, 2006 initial decision (ID) that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we DISMISS the PFR as untimely filed with no showing of good cause for the delay.

**BACKGROUND**

¶2 On December 20, 2005, the appellant filed a complaint with the Office of Special Counsel (OSC) protesting her removal from her position at the agency. Initial Appeal File (IAF), Tab 2 at 7-20. On December 28, 2005, the appellant filed an appeal with the Board alleging that she was subject to an involuntary

retirement in the face of a removal action. IAF, Tab 2 at 4. In response to an acknowledgment order issued by the administrative judge (AJ), the appellant maintained that she was forced to retire under duress because she was facing removal. IAF, Tab 4 at 1-2.

¶3 On February 6, 2006, the AJ dismissed the appeal for lack of Board jurisdiction, finding that the appellant failed as a matter of law to make out a claim that her retirement was involuntary. IAF, Tab 5 at 3. She noted that the appellant faced a classic choice between unpleasant alternatives, but the appellant's choice was not involuntary simply because it was unpleasant. *Id.* The AJ also found that the Board lacked jurisdiction to address the claims raised in the appellant's OSC complaint because 120 days had not passed since the appellant sought corrective action before OSC, and OSC had not informed the appellant that it terminated its investigation. *Id.*; see [5 U.S.C. § 1214\(a\)\(3\)](#).

¶4 The appellant filed a PFR on December 10, 2008. Petition for Review File (PFRF), Tab 1. In response to an acknowledgment order issued by the Board, the appellant filed a motion to waive the time limit for filing a PFR for good cause shown. *Id.*, Tabs 2, 5. The agency filed responses opposing the appellant's PFR and opposing the appellant's motion to waive the limit for filing. *Id.*, Tabs 4, 9.

### ANALYSIS

¶5 A PFR must be filed within 35 days after the date the ID was issued, or, if the appellant shows that she received the ID more than 5 days after it was issued, within 30 days after the date that she received the initial decision. *Lawson v. Department of Homeland Security*, [102 M.S.P.R. 185](#), ¶ 5 (2006); [5 C.F.R. § 1201.114\(d\)](#). Here, it appears that the last day the appellant could timely file her PFR was March 13, 2006.<sup>1</sup> IAF, Tab 5 at 4. As noted above, however, she

---

<sup>1</sup> The appellant has made no showing that she received the ID more than 5 days after it was issued. See [5 C.F.R. § 1201.114\(d\)](#).

did not file her PFR until December 10, 2008, nearly 3 years late. *See* PFRF, Tab 1. Thus, her PFR was untimely filed.

The appellant failed to diligently pursue her appeal.

¶6 The Board will waive the filing deadline for a PFR only upon a showing of good cause for the delay in filing. *Lawson*, [102 M.S.P.R. 185](#), ¶ 5; [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause for the untimely filing, the appellant must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). Factors that are considered in the determination of good cause include the length of the delay, the reasonableness of the excuse and showing of due diligence, whether the appellant is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune that similarly shows a causal relationship to her inability to file her petition in a timely manner. *See Wyeroski v. Department of Transportation*, [106 M.S.P.R. 7](#), ¶ 7, *aff'd*, 253 F. App'x 950 (Fed. Cir. 2007).

¶7 The appellant asserts that good cause exists for her delay in filing her PFR because she was a pro se litigant, was unfamiliar with the Board's procedures, and "did not possess the background necessary to understand complex legal principles regarding the Board's jurisdiction." PFRF, Tab 5 at 4. She further asserts that she "was unable to retain counsel to represent her until well after the original March 13, 2006, deadline." *Id.* She notes, however, that she "did attempt to diligently pursue her case by timely filing a complaint wit[h] the [Equal Employment Opportunity Commission]." *Id.*

¶8 In order to establish good cause for an untimely PFR, an appellant's confusion regarding Board procedures must relate to a specific ambiguity either in the instructions she received or in a Board procedure. *Noble v. U.S. Postal Service*, [73 M.S.P.R. 59](#), 63 (1997). To the extent the appellant claims that her PFR was untimely filed because she was confused, the ID issued by the AJ

clearly advised the appellant that it would become the Board's final decision unless she filed a PFR with the Board on or before the filing deadline of March 13, 2006. *See* ID at 4. It also described the procedure for filing a PFR with the Board. *See id.* at 4-5. Moreover, even if the appellant was confused as a result of proceeding pro se, we find no evidence that she made any effort to remedy her confusion by contacting the Board from the time of the issuance of the ID in February 2006 until the time she filed her PFR in December 2008. Furthermore, the appellant's inability to procure timely legal assistance does not constitute good cause for waiving a filing deadline. *See High v. Department of the Army*, [30 M.S.P.R. 441](#), 443-44, *aff'd*, 809 F.2d 792 (Fed. Cir. 1986) (Table). Thus, under the circumstances, the appellant has failed to show that she diligently pursued her appeal to excuse her 33 month delay in filing her PFR. *See Alonzo*, 4 M.S.P.R. at 184.

The appellant failed to show that her PFR was delayed as a result of her ill health or incapacitation.

¶9 The appellant also asserts that she was unable to pursue her claims with the Board due to "serious health problems that manifested shortly after her termination/involuntary retirement," including chronic anxiety from which she continues to suffer. PFRF, Tab 5 at 5-6. The Board may find good cause for a delay in filing a PFR due to an appellant's hospitalization, ill health, or incapacitation extending beyond the regulatory time limit as prescribed in the Board's regulations. *Van Cura v. Office of Personnel Management*, [57 M.S.P.R. 566](#), 568-70 (1993); *Suchecky v. U.S. Postal Service*, [47 M.S.P.R. 27](#), 29 (1991).

¶10 In support of her assertion, the appellant submits a discharge notice showing that she was treated for stress and anxiety at the Washington Adventist Hospital Emergency Room on October 6, 2005, *see* PFRF, Tab 5, Exhibit 1, and a December 6, 2005 note from her physician explaining that she was diagnosed with General Anxiety Disorder on October 10, 2005, *see id.*, Exhibit 2. The appellant asserts that since that time she has continued to suffer from chronic

anxiety in that she has been unable to apply for new employment and has rarely left her home due to anxiety “and the low confidence and self-esteem issues associated with her illness.” PFRF, Tab 5 at 6. Yet, she fails to submit any medical evidence updating her condition since December 6, 2005.<sup>2</sup> Moreover, the appellant’s physician stated in the December 6, 2005 note that the appellant “is on medication . . . and is doing well.” PFRF, Tab 5, Exhibit 2. Additionally, the appellant was apparently well enough to “diligently pursue her case by timely filing a complaint wit[h] the [Equal Employment Opportunity Commission].” *See id.*, Tab 5 at 4. Therefore, the appellant has failed to demonstrate that she suffered from ill health or incapacitation so as to establish good cause for her nearly 3-year delay in filing her PFR. *See Van Cura*, 57 M.S.P.R. at 568-70; *Sucheck*, 47 M.S.P.R. at 29.

The appellant failed to show that new evidence establishes good cause for the untimely filing of her PFR.

¶11 The appellant asserts that new and material evidence, not available prior to the issuance of the ID, was discovered upon the February 5, 2008 conclusion of the Equal Employment Opportunity Commission’s (EEOC’s) investigation into the appellant’s April 18, 2006 Equal Employment Opportunity (EEO) complaint alleging discrimination on the basis of her age, race, and sex, and retaliation due to prior EEO activity. PFRF, Tab 1 at 3. She further asserts that, based on this evidence, an EEOC administrative judge dismissed the appellant’s EEOC hearing request pending a final determination by the Board regarding its jurisdiction over the matter. *Id.* at 3-4; *see* PFRF, Tab 1, Subtab 3.

---

<sup>2</sup> When an appellant states that the reason for her filing delay is physical or mental illness, she must receive explicit information regarding the legal standard for establishing good cause on that basis and be afforded a fair opportunity to submit evidence and argument to demonstrate that the standard has been met. *See Lacy v. Department of the Navy*, [78 M.S.P.R. 434](#), 438 (1998). The appellant received such information on the Board form on which she filed her motion to waive the deadline for filing her PFR. *See* PFRF, Tab 5 at 2 n.1.

¶12 The discovery of new evidence may establish good cause for the untimely filing of a petition for review “if the evidence was not readily available before the close of the record below, and if it is of sufficient weight to warrant an outcome different from that of the initial decision.” *Satterfield v. U.S. Postal Service*, [80 M.S.P.R. 132](#), ¶ 5 (1998) (quoting *Boyd-Casey v. Department of Veterans Affairs*, [62 M.S.P.R. 530](#), 532 (1994)). Specifically, the appellant asserts that she was not aware when she filed her initial appeal that “the Notification of Personnel Action ordering her removal had been executed on the same day that she retired from her position . . . .” PFRF, Tab 1 at 4 (citing Exhibit 4). However, this allegedly newly discovered evidence is not new as it is already part of the record. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). Exhibit 4 to the appellant’s PFR, a Standard Form 50 (SF-50) dated December 15, 2005, and effective December 5, 2005, which the appellant claims was “not available to [her] prior to the Initial Decision issued by the MSPB,” is also part of the Initial Appeal File. *See* PFRF, Tab 1 at 3, Ex. 4; IAF, Tab 2, Ex. 1 at 54. Thus, not only was it available to the appellant prior to the issuance of the ID, but it was submitted by the appellant below with her initial appeal. Accordingly, the SF-50 does not constitute new evidence, and it is irrelevant to the issue of the timeliness of the appellant’s PFR.<sup>3</sup>

¶13 The appellant also asserts that affidavit interviews conducted with coworkers and the appellant, compiled during the course of the EEOC investigation, demonstrate that the appellant was coerced into retiring. PFRF, Tab 1 at 5-7. To constitute new and material evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed. *Gursslin v. U.S. Postal Service*,

---

<sup>3</sup> We need not address any effect the SF-50 may have on the Board’s jurisdiction over this appeal, since the only issue before us is the timeliness of the appellant’s petition for review.

[102 M.S.P.R. 427](#), ¶ 9 (2006). These interviews were conducted on June 25, August 8, and August 13, 2007. *See* PFRF, Tab 1, Subtabs 5-7. Thus, while the documents presented by the appellant are new, in that the interviews were conducted after the issuance of the ID on February 6, 2006, the appellant has failed to even attempt to demonstrate that the information contained in the documents was unavailable despite the appellant's due diligence when the record closed below. *See Gursslin*, [102 M.S.P.R. 427](#), ¶ 9. Thus, the affidavit interviews submitted by the appellant on review do not constitute new and material evidence and do not establish good cause for the appellant's delay in filing her PFR.

¶14 We therefore DISMISS this PFR as untimely filed without a showing of good cause for the delay.

#### ORDER

¶15 This is the final decision of the Merit Systems Protection Board concerning the timeliness of the PFR. The ID will remain the Board's final decision with regard to the dismissal of the appeal for lack of Board jurisdiction. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

#### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court

no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

---

William D. Spencer  
Clerk of the Board  
Washington, D.C.